Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

Case No. C.A.-07-1510
U.S. COURT OF APPEALS (4TH CIRCUIT)

LYNN HOWARD

Petitioner

vs.

UNITED STATES ARMY

Respondent

PETITION FOR WRIT OF CERTIORARI

Lynn Howard
Petitioner
Schulstr. 4
67376 Harthausen,
Germany

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's claims (as Plaintiff) were previously submitted to Equal Employment Opportunity Commission for review as a prerequisite to the filing of the base lawsuit hereunder under 42 U.S.C. 2000, etc. and whether Petitioner's complaint sets forth viable causes of action on the latter claims, the equal pay claims, and the other claims. Stated alternatively, was there a viable basis to dismiss Petitioner's complaint based such.

LIST OF PARTIES

1. All parties to this case are listed on the cover of this brief.

CORPORATE DISCLOSURE STATEMENT

(a) Petitioner is not an employee of the United States Army (but was at the

commencement of this case at the District Court level.)

(b) Respondent is the United States Army, in which it is not a publicly held corporation or affiliate of a publicly owned corporation.

(c) There is no known third party independent of this litigation, that has a financial interest in the outcome of this litigation.

IN THE

SUPREME COURT OF THE UNITED STATES

LYNN HOWARD
Petitioner

vs.

THE UNITED STATES ARMY
Respondent

On Petition For a Writ of Certiorari to the United States Supreme Court

PRAYER AND JURISDICTIONAL BASIS FOR RELIEF

Petitioner prays that the Writ of Certiorari be granted herein for the reasons stated below. Jurisdiction of this matter is advanced pursuant to 42 U.S.C. § 2000, et. seq. 28 U.S.C. 1331; 28 U.S.C. 1391; 29 U.S.C. 216; 29 U.S.C. §206; 29 U.S.C. 216(B); and 28 U.S.C. 2343.

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b.) It is asserted by Petitioner that it was error to dismiss Petitioner's complaint on the basis upon which Respondent namely failure to press all such matters administratively before the EEOC, and failure to set forth a viable cause of action.

Petitioner argues that effectively all matters were administratively reviewed before the EEOC and that it was improper to dismiss Petitioner's complaint on these issues.

Additionally, Petitioner below argues that he did state a viable claim, and it was improper for the lower court to dismiss his complaint on the basis of failure to state a claim up which relief can be granted. Petitioner maintains that his employment discrimination claims are viable under applicable federal statutes.

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PRAYER AND JURISDICTIONAL BASIS FOR RELIEF

Petitioner prays that the Writ of Certiorari be granted herein for the reasons stated below. Jurisdiction of this matter is advanced pursuant to 42 U.S.C. § 2000, et. seq. 28 U.S.C. 1331; 28 U.S.C. 1391; 29 U.S.C. 216; 29 U.S.C. §206; 29 U.S.C. 216(B); and 28 U.S.C. 2343.

STATEMENT OF THE CASE

It should be noted that in the Petitioner filed his complaint against Defendant (Respondent) with this latter action centered on claims under 42 U.S.C 2000(e), for discrimination in employment, among other claims (including claims viable in state courts).

Specifically, Petitioner Lynn Howard filed a complaint against Respondent in the United States District Court for the Eastern District of

Virginia.

Respondents also sought to dismiss said Complaint mainly on the basis that the claims did set forth viable causes of action and/or failed to exhaust administrative remedies.

Petitioner filed an internal complaint with the United States Army's internal unit for handling job discrimination concerns, after which a mediation proceeding was consummated. Subsequently Petitioner filed an appeal to the EEOC. In proceedings before the EEOC, the Department of the Army participated in such administrative proceedings. The Hearing Officer in this matter rendered the following decision, in part, denying Petitioner's

complaint. (Copy attached to Petitioner's complaint)

> Pursuant to 29 C.F.R. Section 1614.405, the Commission accepts the complainant's appeal from the agency's final decision in the above-entitled matter. Complainant alleged that the agency had discriminated against him on the basis of reprisal for prior EEO activity when he was subjected to disparate treatment in the terms and conditions of his employment with regards to being denied personnel actions, pay, promotions, and training from January 15, 2000 through March 8, 2001.
> After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity commission to affirm the agency's final decision because the preponderance of the evidence of record does not establish that discrimination occurred.

STATEMENT OF RIGHTS ON APPEAL RECONSIDERATION

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Integrated within such decision of the

EEOC hearing officer was the right to sue notice.

Pursuant to such notice of right to sue,

Petitioner then filed his complaint with the

District Court (in part);

As noted from the Petitioner's complaint, Petitioner sets forth the fact that he proceeded through an administrative process through the Equal Employment Opportunity Commission (via the Department of the Army, Internal Affairs Unit). As stated above, the Petitioner set forth in his complaint hat the EEOC entertained the administrative complaint and entered a ruling on the complaint, denying the claim of Petitioner and setting forth the right to sue. Moreover, the Department of the Army participated in such EEOC proceedings (This EEOC proceeding followed Petitioner's administrative mediation

process through the United States Army, as discussed above.)

After such complaint was filed, Respondent's filed a motion to dismiss the case on various grounds. Respondent's sought dismissal under Federal Civil Rules 12(b)(6) and Civil Rule 41(B) (The latter section covering dismissals for lack of prosecution).

In this motion to dismiss, Respondent's (Defendants) made certain allegations about procedural grounds, and throughout the discussion in such motion there are various references to factual aspects and developments as to the background of this matter (which are not integrated into the pleadings), some of which are discussed below. Reference is made to

matters of a factual nature extrinsic to the record – which may or may not transform from the court's perspective the motion to dismiss to one for summary judgment under Civil Rule 56.) Additionally, the judgment order granting Respondent's request for dismissal never even addressed significant portions of the Petitioner's complaints regarding his claim of employment discrimination.

The three main bases for Defendant's (Respondent's) motion to dismiss were as follows:

(1.) Petitioner's complaint fails to state valid cause of action

(2.) Petitioner's complaint sets forth bases of relief not covered by prior

filings under the EEOC.

Petitioner filed a response to such motion challenging all three bases for such relief. Thereafter, the U.S. District Court granted Defendants' motion dismissing the subject case and after Appeal being filed in the United Stats Court of Appeals for the Forth Circuit,. The Circuit Court issued a judgment on January 16, 2009 dismissing Plaintiff's complaint.

REASONS FOR GRANTING THE WRIT

1. It is an error to dismiss a Complaint under circumstances wherein the Complaint states a cause of action and without stating all the particulars of a cause of action.

2. It is in error when Petitioner's complaint was dismissed for failure to state a cause of action under Federal Rule of Civil Procedure 8 when Petitioner (as Plaintiff) complied with the administrative procedures and previously

submitted to Equal Employment Opportunity Commission for review as a prerequisite to the filing of the base lawsuit hereunder under 42 U.S.C. 2000, etc. and whether Petitioner's complaint sets forth viable causes of action on the latter claims, the equal pay claims, and the other claims. Stated alternatively, was there a viable basis to dismiss Petitioner's complaint based on the foregoing?

3. It is asserted by Petitioner that it was error to dismiss Petitioner's complaint on the basis upon which Respondent s (Respondent s sought), namely failure to press all such matters administratively before the EEOC, and failure to set forth a viable cause of action.

Petitioner argues that effectively all matters were administratively reviewed before the EEOC and that it was improper to dismiss Petitioner's complaint on these issues. Additionally, Petitioner below argues that he did state a viable claim, and it was improper for the lower court to dismiss his complaint on the basis of failure to state a claim up which relief can be granted. Petitioner maintains that his employment discrimination claims are viable under applicable federal statutes.

It is an established general doctrine an

Appellate counsel reviews a district court's

decision to grant a motion to dismiss for lack of subject matter jurisdiction in is on a *de novo* basis (***Fairfax Co. Redevelopment & Housing Authority v. Schlosser Co.***, 64 F3d 155, 4th Circuit). Petitioner contends a motion to dismiss under Rule 12 (b)(6) should not be granted "unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim, which would entitle him to relief" (***Conley v Gibson***, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). In considering the motion, the Court is generally mandated to accept all factual allegations in the complaint as true. See ***Watson v. Southern R. Co.***, 420 F. Supp 483 (4th Circuit, 1975).

In a motion to dismiss a complaint there are two main or basic avenues available to a Respondent to seek dismissal on the substantive matters (on the merits of a complaint). These two routes are either a motion for judgment on pleadings under Federal Civil Rule 12(B) or alternately a motion for summary judgment under Federal Civil Rule 56(A). [1] (Petitioner relates herein pertinent legal constraints on summary judgment motions by reason of Respondent's reference to matters outside the record or matters beyond Petitioner's complaint.) Comparably, a motion for summary judgment under FRCP 56 provides that a party may rely

[1] A motion for judgment under the pleadings under Civil Rule 12-B-6 is apparently the only subpart of Civil Rule 12(B) that restricts the scope of such motion to the pleadings. (e.g. complaint, etc.)

on evidence external to the pleadings and the basic considerations of such a motion must rise from the parameters of the Federal Rules of Civil Procedure, Rule 56(c), which states in part, as follows:

> "Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admission, Affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one

> conclusion and that
> conclusion is adverse to the
> party against whom the
> motion for summary judgment
> is made, such party being
> entitled to have the evidence
> or stipulation construed most
> strongly in his favor..."

It is thus clear that to grant a motion for summary judgment as based on such extrinsic (admissible) evidence, there must be an absence of a genuine issue of fact (as to material issues) and the moving party must be entitled to a judgment as a matter of law from such facts.

Moreover, a motion for summary judgment requires the court to construe the facts pertinent to such motion most strongly against the party advancing the motion. *Ibid.*

Moreover in general, summary judgment is considered improper whenever the facts, as to

key case elements, reveal a disparity between the versions of the respective parties. Alternately stated, if a factual dispute exists as to essential issues, summary judgment is considered not proper. (See generally ***Liberty Mutual Insurance Co. v Carr,*** 1993 U.S. Dist. LEXIS 14150 (4th Cir. 1993). If indeed such dispute exists, then in such event a summary judgment award is improper. The issue that must be analyzed is whether there is any genuine issue as to any material fact. If so, then the granting of a motion for summary judgment is erroneous.

A party moving for summary judgment has the burden of proving there is no genuine issue as to any material fact, and even where the opposing party comes forth with nothing,

summary judgment must be deni·

supporting the motion fail to establish

nonexistence of such issue. ***Bloomgarden v. Coyer***, 479 F2d 201, 206 (D.C. Cir. 1973).

> "**[S]ummary judgment** is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such **clarity** as to leave no room for controversy and that the other party is not entitled to summary judgment under any **discernible** circumstances." ***Robert Johnson Grain Co. v. Chemical Intercharge Co.*** 541 F2d 207, 209 (8th Cir. 1976) (citing ***Winsor v. Bethesda Gen. Hosp.***, 523 F2d 891, 893, n. 5 (8th Cir. 1975).

Moreover, in any summary judgment motion, it is imperative that proper evidentiary standards be applied to any evidence submitted as part or in support of a summary judgment motion. In this respect Federal Civil Rule 56 (E)

the requirement of affidavits (filed as a part of a summary judgment motion) is set forth as follows:

> (E) **Form of affidavits; further testimony; defense required.**
>
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but

> his response, by affidavit otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

It is observed that not only must an affidavit filed in support of summary judgment motion affirmatively set forth the competence of affiant and the basis of personal knowledge of affiant, all evidence incorporates in such affidavit must actually be competent testimony and set forth a basis of personal knowledge (pursuant of Federal Evidence Rule 602):

By reason of the foregoing, any party moving for a summary judgment must affirmatively demonstrate and prove affirmative

evidence supporting its position on the key issues indicated by such moving parties as the basis for summary judgment. These areas of proof cannot simply be statements, conclusions, or allegations of counsel.

For a motion to dismiss under Federal Civil Rule 12(B)(6), there are areas wherein evidence external to the pleadings can be utilized, such as motions to dismiss because of improper venue or improper jurisdiction. As to subparts 1, 2, 3, 4, 5, and 7 of Civil Rule 12(B)(6) external evidence that could be admissible at trial is permitted, but not so for subpart six (6) of Federal Civil Rule 12(B) (the section concerning judgment on the pleadings for failure to state a cause of action. (See for

example, ***Lefkowitz v Lider***, 1978, 443 F. Supp. 352 D.C. Mass).

EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL ISSUES OR IS A MATTER OF GREAT PUBLIC INTEREST

Petitioner maintains that this case involves substantial constitutional issues, one of which involves the right of the Court to deprive Petitioner of his right to have legitimate grievances redressed by a court with jurisdiction and a duty to hear such cases.

Petitioner argues that he stated a legitimate cause of action as defined by Federal Rule of Civil Procedure 8(a) by pleading a claim for relief which puts forward a "short plain statement of the grounds upon which the court's

jurisdiction depends", and "a short plain statement of the claim showing that the pleader is entitled to relief..." Petitioner argues that his properly pleaded claim for relief was denied to him improperly by the trial court under the pretense of claiming the Petitioner failed to state a proper claim. Furthermore, this is a substantial constitutional issue or a matter of great public interest and should be reviewed by this Court to determine what constitutes a claim for relief under Federal Rule of Civil Procedure 8(a).

Additionally, Petitioner argues that the administrative remedies need not necessarily be exhausted.

More specifically, under 12(B)(6) motion to dismiss a co.. failure to state or claims upon which rel.. be granted) the initial parameters for review for such a motion (as generally referenced) is Federal Civil Rule 8(A), which rule requires that a claim for relief set forth a short and plain statement of the claim for relief in the pleading showing that the party is entitled to relief. A complaint is to demonstrate some recognized legal basis upon which judicial relief can be awarded. (See ***District of Columbia v Air Florida, Inc,*** 1984, 243 App. DC, 750 F2d 1077).

Further, it has been held at various times (by numerous federal courts) that a complaint

which does not set forth all relevant facts should not be dismissed. (See for example ***Hrobec v National Railroad Passenger Corporation,*** 981 Fed. 692, CA, 7th Circuit, Illinois, 1992).

Usually such motions to dismiss are generally not considered consistent with the policy of the federal courts (as well as most state courts) to attempt to adjudicate cases on the merits of the case, and one of the more commonly used procedures is to permit a Respondent to file a motion either a motion for more definite statement or utilize discovery tools authorized under the Federal Civil Rules and/or summary judgment proceedings as discussed above. (See in this regard ***Innovative Digital Equipment v Quantom Technology, Inc.*** 597

F. Supp. 983, No. Ohio 1984-which case supported the use of a motion for definite statement, coupled with granting the moving party leave to refile the motion to dismiss after the receipt of the definite statement.) Yet another guideline for presentment of a motion to dismiss for failure to state a claim upon which relief can be granted, is that only the four squares of the pleading should be utilized for this purpose. (***Harper v Cserr***, 544 F2d 421.) Generally no aspect outside the record of the case should be presented or used in determining a motion to dismiss on such basis. (***Labounty v Adler,*** 933 F2d 121, 1991, CA2, N.Y.) In this respect however, a Court may refer to

documents that are attached to the complaint, (such as the EEOC decision appended to Petitioner's complaint.)

In considering Rule 12(B)(6) motion to dismiss, it has been a general thread of the law that the complaint be liberally construed and viewed in the light most favorable to the Petitioner and on a motion to dismiss, a federal court presumes that general allegations embrace those specific facts that are necessary to support the claim. In addition, the well pleaded allegations of fact contained in the complaint and every inference fairly construed therefrom are accepted as true for purposes of such a motion, including facts alleged on information and belief.

In summary, the basic test on a motion to dismiss is whether the complaint, with all the well pleaded material facts taken as true and construed in the light most favorable to the Petitioner, sets forth facts sufficient to state a legal claim. The standard most frequently applied (in this regard) is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a plaintiff cannot prove any matters in support of the claims that would entitle the plaintiff to relief. (See ***Scheuer v Rhodes,*** 1974, 416 US 232, 40 L Ed 2d 90).

It is further set forth in the last sentence of Federal Civil Rule 12 (B) that if a party files a motion to dismiss for failure to state a claim

upon which relief can be granted, and matters outside the pleading are presented in conjunction with such motion, and such extrinsic matters are not excluded by the court, the motion may at the court's discretion be considered as a motion one for summary judgment and disposed of as provided in Federal Civil Rule 56, with the parties given a reasonable opportunity to present all material made pertinent to such a motion. (i.e. as indicated in Federal Civil Rule 56 C and 56 E.)

Alternately stated, a motion to dismiss (under Federal Civil Rule 12B) is properly treated as a motion for summary judgment under Federal Civil Rule 56 where, in order to decide the motion, the trial court has to consider

evidence or documents submitted in support of the motion as well as the pleadings. Once a trial judge converts a motion to dismiss to a motion for summary judgment by accepting material beyond the pleading that is objected to in conjunction with the motion, the court may consider any additional material fact that may be admissible or usable at trial.

In short as to the issues in a Federal Civil Rule 12(B)(6) motion (in light of the primary objective of the law to obtain a determination on the merits) there are other effective procedural devices which are useful tools for the determining the particular allegations and the determination of the legal sufficiency of a claim, such as through the discovery procedures, and

motions for a more definite statement, judgment on the pleadings, and summary judgment. (See ***Carss v Outboard Marine Corp***. 1958, CCA Fla, 252 F22d 690).

In light of the parameters of Federal Civil Rules as 12(B) and 56(C), it is vital to review whether Defendants have met their initial burdens for either a summary judgment motion or a motion to dismiss under Federal Civil Rule 12(B)(6). As stated above, in a summary judgment motion filed pursuant to Federal Civil Rule 56 the moving party (parties) has the initial burden of coming forth with specific factual evidence from depositions, interrogatories, affidavits, and other proper evidentiary matters filed in the case, which factual evidence

demonstrates that the moving party is entitled to judgment as a matter of law.

A review of the Respondent's motion filed herein, (in light of the above constraints of Civil Rule 12B or Civil Rule 56), it is clear that any summary judgment motion (if the court deems Defendants' motion to be such) falls short of the criteria and mandate of Civil Rule 56, insofar as the burden of proof incumbent in such summary judgment motion of Defendants.

More specifically, as to the summary judgment motions filed by Defendants (Respondent's) the only evidence presented by Respondent's are references to past court proceedings that show that the Petitioner was involved in a prior court filing in this court plus

the EEOC filing addressed in Petitioner's complaint. While reference to these documents may be hearsay, they could potentially fall within the exceptions of the Federal Civil Rules 802-803, but they are still not authenticated under Evidence Rule 901, nor have they been presented to the court under a judicial notice process (Federal Evidence Rule 201) (or otherwise).

As can be seen above, in any motion for summary judgment motion, relief cannot be granted to a moving party on the face of the pleading alone to demonstrate a basis for a summary judgment motion (see Civil Rule 56 (C)). Nor are statements of counsel as to factual aspects admissible or otherwise proper to

support a motion for summary judgments.

In summary, Respondents did not provide to the court any evidence recognized under Federal Civil Rules 56(C) or 56(E). In fact, Respondents' counsel merely makes statements (without proper supporting affidavits or other proper evidence). It is Respondents' contention that a viable summary judgment motion has not been advanced, nor has a viable motion under Civil Rule 12(B)(6) been so advanced (since the latter motion of Defendant's refers to matters outside the record. Furthermore, the court failed to even address several issues in the Petitioner's complaint.

In Respondent's motion to dismiss, it is claimed that Petitioner's complaint should be

dismissed because it fails to state a claim upon which relief may be granted. A Federal Rule of Civil Procedure (FRCP) 12(b)(6) motion to dismiss is raised here to challenge the sufficiency of Petitioner's complaints. Consequently the appropriate standard to apply in reviewing the issue of sufficiency, is FRCP 8(a) which simply requires that the pleading set forth a claim for relief containing a short and plain statement of the claim demonstrating that the pleader is entitled to relief. (See: ***District of Columbia v. Air Florida, Inc.***, 750 F2d 1077) In other words, a complaint must present sufficient information to suggest that there is some recognized legal theory upon which relief can be granted. (*Id.*)

Respondents state and claim that Petitioner makes general allegations of discrimination and harassment in his complaint and gives no further information. Defendants cite ***Simpson v Welch***, 900 (F.2d 33, 35 4th Cir. 1990) to the effect that conclusionary statements are not enough and do not state a claim upon which relief can be granted. However, Petitioner submits, and Respondents recognize as much, that FRCP 8(a) only requires "a short and plain statement of the claim showing that Petitioner is entitled to relief;" citing ***Conley v Gibson***, 355 U.S. 41, 47 (1957).

Petitioner did indeed file a complaint setting forth a clear statement of his claim that

is sufficient under the guidelines set forth under civil rule 8(a). In this respect Civil Rule 8(a) provides the following guidance:

> A pleading which sets forth a claim for relief whether an original claim; counterclaim; cross-claim; or third party claim, shall contain . . . . (2) a short and plain statement in of the claim showing that the party is entitled to relief. . . . .

A perusal of Petitioner's complaint language as stated above reveals appropriate and sufficient language to state viable claims.

> ..... 4. During this period of his employment with the Department of the Army, Plaintiff has been classified as a clerk, with a present wage grade designated grade five and having a prior grade of GS-4 and is assigned to the APO mail processing center in Mannheim, Germany, where he has performed his duties in a satisfactory manner and with

favorable fitness reports. Plaintiff was hired at a rate of $8.00 dollars per hour, and is currently being paid at a rate of approximately $16.00 dollars per hour.

5. At various time during the course of his employment, Plaintiff has performed work equal in skill, effort and responsibility to the work of various female, minority, and younger employees under age forty, who are presently paid and were previously being paid a higher wage than Plaintiff for performing the same work, with these latter aspects constituting a violation of 29 USC Section 206(d)(1) relative to equalization of pay under the purview of such statute. Specifically, female, minority, and younger under the age of forty employees of Defendant in said postal group, with the same or less seniority have been paid more than Plaintiff above his prior wage rate and his presently stated hourly rate and specifically said minority, female, or younger employees

having been paid above said hourly rates of $16.00 per hour, or the previous $12.00 per hour of Plaintiff, among other pay differentials.

6. Had Plaintiff been paid a wage equal to that of the other said minority, female, or younger employees, at the postal unit where Plaintiff works, who performed the same or substantially equivalent work as Plaintiff, Plaintiff would have been paid at a rate of more than twelve dollars per hour from July 1, 1996 to February 10, 2001, and more than $16.00" "dollars per hour for the period from February 10, 2001, to present. As a result Plaintiff has lost wage income as determined by the differences paid to such minorities and females above said amounts of $12.00 per hour to February 10, 2001 and above $16.00 per hour after said latter date by a margin of at least one dollar per hour more

than what he was paid from July 1, 1996 to present.

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9. Plaintiff states that said Defendant through its agent in 2004 and 2005, including supervisors Felip Gonzalez and Robert Smith at said A.P.O. where Plaintiff works and other supervisors of Defendant have made statements to third persons, without privilege to do so, that Plaintiff has" "frequently malingered, feigning illness and taking off unnecessary time relative to his work, having been late for work, and has not performed certain required tasks in his job in compliance with standards set forth under stated guidelines under the Army Postal Group. Said statements were false and were made by Defendants intentionally with actual malice or with reckless disregard for the truth thereof. Defendant through said agents,

did make such statement about minorities or females.

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15. "For his cause of action, Plaintiff, a white Caucasian male, states that Defendants discriminated against Plaintiff on the basis of his race, sex, and age, denying Plaintiff reasonable working conditions and other employment advantages granted to female employees, minority employees, employees under the age of forty (40), and other employees of Defendants and that Plaintiff was harassed by employees of Defendants and known to Defendant including his superiors, Mr. Gonzalez and Mr. Robert L. Smith, said harassment and discriminatory acts causing stress, humiliation, and other problems rendering it difficult and perilous to Plaintiff's health to work within such conditions. Specifically, Plaintiff through agents and supervisors of Defendant was

defamed, embarrassed by direct physical contact, such as striking, improper physical contact, making fun of Plaintiff in front of other employees, excessive and unwarranted monitoring of Plaintiff's work activities, denying Plaintiff reasonable work conditions, denying Plaintiff equal pay relative to minorities, females, and younger employees who are under age forty, or who have less seniority of Plaintiff, not offering notice to Plaintiff of job openings or job opportunities, among other activities.

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(a) Maintaining, terminating, hiring, and granting employment rights to other employees of Defendant at said Postal Unit on the basis of sex, age, and race granting females and individuals under age 40, who have or had the same or less seniority than Plaintiff, granting higher wages to" "females, minorities, and

individuals under forty, granting better promotion opportunities as specifically stated herein, better working conditions to said females, minorities, and individuals under age forty than males such as Plaintiff.

(b) Providing males working conditions unfavorable to males, compared to females by granting female working conditions that involve less strenuous physical activity compared to Plaintiff and other males constituting sex discrimination;

(c) Maintaining policies and practices with respect to, but not limited to, wages, job assignment and other terms and conditions of employment which unlawfully operate to deny equal opportunity to employees because of their sex, race, age, and other acts of discrimination, including granting to females, minorities, and younger workers under forty than Plaintiff and other males or older individuals working conditions that do not include favorable hours, better pay.

(d) Permitting harassment of Plaintiff by Defendant's employees, such as physically contacting or assaulting Plaintiff and male employees defaming male employees.

(e) Denying proper working conditions to Plaintiff and other non-minority males over forty such as monitoring Plaintiff's work activities.

(f) Wrongfully discriminating against employees, including Plaintiff based on sex, age, and race such as not giving Plaintiff and non-minority males notice of new job openings.

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26. Defendants have engaged in discriminatory practices against Plaintiff regarding the terms and conditions of his employment on the basis of his physical disability and other aspects, including discrimination "against" Plaintiff on the basis of

his physical disability. Specifically, Plaintiff has had back injuries sustained during the time of his employment with Defendant, which has hindered his ability to perform certain job tasks at his work at the Post Unit of Defendant. Said back injury, resulting in lumbago of his back causing limitations on Plaintiff's ability to bend, lift, and perform various physically job related actions. Plaintiff states that Defendant, being aware of said physical problems of Plaintiff has failed or refused to accommodate Plaintiff by providing essential protective gear by assigning Plaintiff work assignments not compatible with such problems, and by challenging Plaintiff's medical leaves as a result of such chronic back injury problems.

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32. Plaintiff states that Defendant, at such postal unit where

He worked granted working conditions favorable to minority employees compared to Plaintiff and other non-minority males, such as by granting non-minority males favorable promotion activity, jobs requiring minimal work responsibility, both physical and other wise by paying non-minority males less than minority males and not harassing minority group..

84. Plaintiff states that Defendants had responsibilities for either giving or training others to provide counseling to the Plaintiff relative to injuries sustained on his disability and

disability benefits. Plaintiff states that Defendants failed to provide such counseling and also failed to train its employees or agents as to such counseling duties or alternatively improperly advised Plaintiff concerning his rights relating to his disability and or failed to properly counsel him concerning his employment rights. By reason of such failure Defendant's breached the duty owed to Plaintiff resulting in loss of benefits that caused loss of benefits that would have been potentially due to Plaintiff, all in the total amount in excess of $100,000.00, and that Plaintiff is entitled to judgment against Defendants accordingly."

Ad can be seen from these paragraphs above, specific aspects were stated in Petitioner's complaint, which yield sufficient specificity under FRCP

8(a)- which requires (as stated) a short and plain statement – since it is not the intent of the Federal Civil Rules that the complaint set forth all the facts of a case – as may be used at trial. Moreover, it is noted that each succeeding claim incorporates references from prior causes of action. For example the discrimination claim incorporates the first cause of action of which spells out specifics of wage discrimination etc.

More directly, from the above quoted sections of Petitioner's complaint, Petitioner has set forth a short and plain statement (as required by Federal Civil Rule 8(a) regarding federal discrimination

claims (along with common law claims), among other matters, as referenced from prior claims of action. Reading Plaintiff's complaint with prior referenced causes of action in total reveals specific language about these claims.

Contrary to Respondent's allegations, Petitioner did makes particular allegations as to his harassment, pay disparity, and discrimination on disability grounds, as can be seen in the above stated paragraphs from Petitioner's complaint. Relative to such claims by Respondent's, it appears that Respondent's seek to have Petitioner plead evidence in his complaint. This is not the usual province of a complaint as contemplated by FRCP 8(a).

Respondent's always have the availability of a motion to make certain or discovery tools as contemplated by Federal Civil Rules 26, etc and other procedural methodology to discover evidence.

Furthermore, Federal Courts frequently maintain that a complaint may lack certain relevant facts or recitation of the law and still avoid a FRCP 12(b)(6) dismissal. (See: ***Hrubec v. National R.R. Passenger Corp.***, 981 F2d 962).

In addition, in regard to this motion of Respondent's to dismiss, it appears that Respondent's express certain matters outside the record or the pleadings. Note is made that Respondent asserted in its motion under statement of material facts that transcended the

record about prior similar filings by Petitioner (which all matters outside the province of a Civil Rule motion 12 (B-6):

> "This is Mr. Lynn Howard's second attempt to file a judicial complaint out of actions arising from his employment with the U.S. Army in Germany. In Civil Action Number 03-CV-127, after Defendants filed a Motion to Dismiss his Complaint, Howard requested that he be allowed to withdraw the Complaint without prejudice. Prior to making this request, Howard filed the instant judicial Complaint. This Court granted his request to withdraw Civil Action Number 03-CV-127."

Such statements are prejudicial to Petitioner, and interjected matters outside the pleadings.

THE CLAIM OF RESPONDENT THAT PETITIONER DID NOT EXHAUST ADMINISTRATIVE REMEDIES ON ANY OF HIS CLAIMS AND THEY SHOULD BE DISMISSED

Respondent's state in their motion to dismiss that Petitioner did not exhaust the requisite administrative process and therefore such claims should be dismissed. While a plaintiff should exhaust required administrative remedies before filing a lawsuit, such remedies must be a mandatory prerequisite, and as Respondent's suggest, Petitioner should process his claim with the EEOC (42 U.S.C. Section 2000 e-5-B, as Respondent's cite). Respondent's state that the EEOC claim delimits the proper scope of any subsequent lawsuit. Petitioner disagrees to such a comprehensive contention

that all charges are barred, and Respondent's

appear to concede that there can be some reasonable relationship to the underlying complaint. In the face of these allegations, Petitioner maintains that administrative remedies were properly processed as more fully discussed below.

Petitioner contends that the scope of the charges in a complaint before the U.S. District Court may exceed the scope of EEOC complaint, and there is some divergence on this issue as between the respective Circuit. See ***Kaplan v. Theatrical Stage Employees***, (525 F2d 1354, 9CCA, 1975 wherein it was held that in EEOC

charges that are considered somewhat ambiguous, in close situations, the matters should be resolved towards allowing the unnamed parties to be sued. (See also ***Sanchez v Standard Brands, Inc.*** 431 F2d 455, 5th CCA, 1970). (See ***Evans v Sharaton Park Hotel***, 503 F2d 177, D.C.CA, 1974). (See also ***Roepsch v. Bentsen***; 846 F. Supp. 1363, 1994, E.D. Wisc). as to flexibility of issues being reasonably related).

Respondent's contend that the EEOC charge was limited to a reprisal action (after he testified on behalf of a black male employee)[2] in another employment discrimination action

[2] This factual aspect also transcends the pleadings

against the U.S. Army. Over and above the aspect that this refers to matters beyond the pleadings, this conclusion does not comport with a full and proper reading of the EEOC decision. As can be observed from the EEOC decision, (as appended to Petitioner's complaint), there is very little discussed about any factual background (and a sparse amount about the theory of discrimination on which the EEOC decision of August 4, 2003 was based). Reference is had in this regard to paragraph one of the decision which sets forth the following language.

> Pursuant to 29 C.F.R. Section 1614.405, the Commission accepts the complainant's appeal from the agency's final decision in the above-entitled matter. Complainant alleged that the agency had discriminated against him on the basis of reprisal for prior EEO

> activity when he was subjected to disparate treatment in the terms and conditions of his employment with regards to being denied personnel actions, pay, promotions, and training from January 15, 2000 through March 8, 2001.

As can be seen from the foregoing language, it appears that there were indeed matters or issues of disparate pay, treatment in terms and conditions of employment such as personal actions, promotions, pay, training, (all set forth in Petitioner's complaint). In addition to the reprisal aspect, these delineated matters were apparently also covered in the EEOC proceeding. It would be vital to rciterate that the EEOC decision (as annexed to Petitioner's complaint is only a final decision –

without an elaboration of the complete background or file). Again, it appears that Respondent's are referencing to matters within the entire EEOC file – which again is evidence beyond the face of Petitioner's complaint to support a motion under Civil Rule 12(B)(6).

In addition, it must be noted that Petitioners complaint sets forth claims not cognizable through the EEOC (the equal pay claim). Thus any EEOC requirement does not affect the viability of such latter claims.

If indeed Respondent's were reviewing the record of the EEOC proceedings in making these claims, which are not really before this Court – then Petitioner should be so informed in order that Petitioner could have produced affidavits or

other evidence to properly refute Respondent 's allegations. As stated above, whenever a motion to dismiss under Federal Civil Rule 12(B) sets forth matters or utilizes matters outside the record or complaint, then the motion transcends the intended limit of such rule, i.e. to obtain a ruling based only on the contents of the pleadings attachment. Matters beyond such pleadings are generally beyond the scope of such a motion (to dismiss) for failure to state a claim on which relief can be granted. (See discussion above). Moreover, it is not certain that the defense of failure to exhaust administrative remedies is the proper subject of a Civil Rule 12(B) motion, unless it is a subsumed under

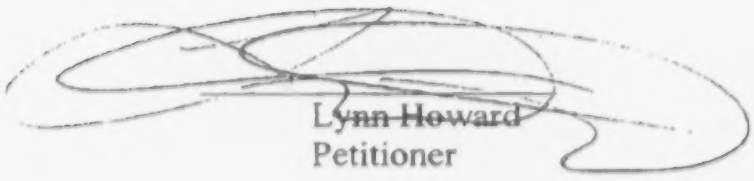
Civil Rule 12(B) subsections (1) or (2) as a jurisdictional issue. However Respondent's did not so file their motions under such subsections or raise it as a jurisdictional question. However, if it does exceed the scope of the pleadings under Federal Civil Rule 12(b) motion, the nonmoving party should be allowed to supplement his reply with affidavits, etc. in order to properly frame a response, since matters are entered external to the complaint and such supplementary evidence may be necessary in this case.

It should be further stressed that not all the counts of Petitioner's complaint are Title VII actions, as one cause relates to the Equal Pay Act under 29 U.S.C. Sec. 206 and there are two

causes of action that are based on common law. These latter claims are clear and state cause of action on specific issues and are not routed through the EEOC.

CONCLUSION

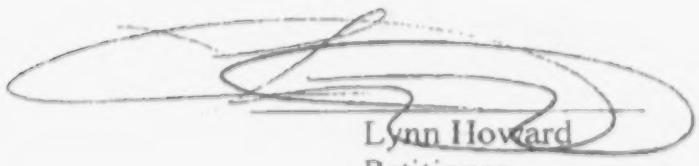
In conclusion, the petition of writ of certari should be granted.



Lynn Howard
Petitioner

CERTIFICATE OF SERVICE

Certification is made that a copy of the petition and writ of certari was mailed to Monika Moore, Attorney, Assistant United States Attorney, Assistant Counsel for Appellee, U.S. Attorneys office, 2100 Jamieson, Alexandria, Virginia 22314.on this 4 day of September, 2009.



Lynn Howard
Petitioner

IN THE SUPREME COURT
OF THE UNITED STATES

Case No. C.A.-07-1510
U.S. COURT OF APPEALS (4TH CIRCUIT)

LYNN HOWARD

Petitioner

vs.

UNITED STATES ARMY

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A-2	Judgment of U.S. Court of Appeals (4th Circuit)
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Case No. C.A.-07-1510
(1:06-CV-00783GBL)

LYNN HOWARD

Plaintiff/Appellant

vs.

UNITED STATES ARMY

Defendant/Appellees

M A N D A T E

The judgment of this Court, entered 1/20/09, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk
3/16/09

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Case No. C.A.-07-1510
(1:06-CV-00783GBL)

LYNN HOWARD

Plaintiff/Appellant

vs.

UNITED STATES ARMY, et al.,

Defendant/Appellees

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/Patricia S. Connor, Clerk
1/20/09

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

LYNN HOWARD

*

Plaintiff

vs. * CIVIL ACTION NO

UNITED STATES ARMY c/o *
SECRETART OF THE AR

*

Defendants

*

THIS MATTER if before the Court on Defendant United States Army's motion to dismiss. In its previous Memorandum Order of April 26, 2007, the court granted Defendant's motion to dismiss without leave to amend. For the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED

in favor of Defendant and against Plaintiff Lynn Howard.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 26th day of April, 2007

_____

Gerald Bruce Lee
United States District Judge

Alexandria,V Cirginia
4/26/07

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

LYNN HOWARD

*

Plaintiff

vs. * CIVIL ACTION NO.

UNITED STATES ARMY c/o *
SECRETART OF THE AR

*

Defendants

*

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendant United States Army's motion to dismiss Plaintiff Lynn Howard's Title VII and ADEA claims, and common law claims of defamation, assault, and emotional disturbance. This case concerns Plaintiff's allegations of race,

age, and gender discrimination and harassment by Defendant. The issues before the Court are: (1) whether the Court should dismiss Plaintiff's Title VII and ANEA claims because Plaintiff failed to file his complaint within ninety (90) days of agency action; (2) whether the Court should dismiss Plaintiff's complaint in its e) day limitations period. Furthermore, Plaintiff cannot avail himself of any tolling provisions for the time that his prior complaints were pending before courts because Plaintiff failed to exhaust all available administrative remedies.

With respect to the first issue, the Court dismisses Plaintiff's Title VII and ADEA claims because Plaintiff failed to file a complaint within the ninety 90) day limitations period.

Furthermore, Plaintiff cannot avail himself of any tolling provisions for the time that his prior complaints were pending before the court.

With respect to the second issue, The Court dismisses Plaintiff's complaint because he fails to set forth facts to support a claim upon which relief can be granted. Plaintiff, in his compliant, makes several conclusory allegations of race, sex, and age discrimination and harassment. Conclusory allegations are insufficient to state a claim for which relief can be granted.

With respect to the third issue, the Court grants Defendant's motion to dismiss because Plaintiff has not come forward with evidence showing that he exhausted his administrative

remedies before filing suit.

I. BACKGROUND

Plaintiff Lynn Howard brings this suit alleging race, gender, and age discrimination by Defendant United States Army.

Plaintiff, a white male, has been employed by Defendant' s postal arm (APO) in the Republic of Germany for over ten years. (Amend. Compl, Section 3.) Plaintiff's job title is that of a clerk, Id. He handles correspondence forwarded to various areas of the world, including the United States. Id. Plaintiff was hired at a grade of GS-4 and a pay of $8.00 per hour. (Amend. Compl. Section 4.) Plaintiff's current grade is GS-5 and he receives a pay of $16.00 per hour. Id.

During the course of his employment, Plaintiff contends that Defendant subjected him to race and gender discrimination, in violation of the civil Rights Act of 1964 ("Title VII"), and age discrimination, in violation of the Age Discrimination Employment Act ("ADEA"). (Amend. Compl. Section 5.) Specifically, Plaintiff contends that minority, female employees, under the age of forty (40), and with less seniority were paid an hourly rate higher than his. Id. Further, Plaintiff alleges that he performed work equivalent to these female employees; therefore, he was entitled to a pay and/or grade increase. (Amend. Compl. Section 6, Section 32-41). Had Plaintiff received such increase, he would have been paid at a rate of

more than $12.00 per hour between July 1, 1996 and February 10, 2001, and a rate of more than $16.00 per hour from February 10, 2001 to the present. (Amend. Compl. Section 6.)

Plaintiff alleges that Defendant made false statements, without privilege to do so, regarding his work ethic. (Amend. Compl. Section 9.) As a result, Plaintiff contends that he was damages by loss of job opportunities and promotion, and a loss of self esteem. (Amend. Compl. Section 10.) Plaintiff further alleges that, through agents of Defendant, he was defamed, harassed, and embarrassed by improper physical contact and unwarranted monitoring; while in the presence of other employees. (Amend. Compl. Section 15-20.)

B. Procedural Background

Plaintiff first filed suit in January 2003; however, Plaintiff voluntarily dismissed the suit on November 12, 2003, after the Defendant filed a motion to dismiss. (Def. Br., at 2-3). With the first suit still pending before court, Plaintiff filed his second suit in October 2003. Id. Once again, Defendant filed a motion to dismiss. Id. By an order signed by Judge Brinkema and dated June 17, 2004, Plaintiff's suit was dismissed with prejudice against all defendants except the Secretary of the Army.[1] (Def. Br., at 2-3). Judge Brinkema, in her order, noted that even if the complaint had been properly pled, Plaintiff failed t exhaust all administrative

remedies. Id. Plaintiff appealed Judge Brinkema's order and the Fourth Circuit affirmed. Plaintiff's third suit was filed February 28, 2005. Id. Defendant again filed a motion to dismiss. Id. Here, Judge Hilton granted Plaintiff fourteen (14) days to file an Amended Complaint. (Def. Br., at 2-3). Plaintiff amended his complaint and filed it with the court on February 6, 2006. Id. Subsequently, Plaintiff voluntarily dismissed his third suit on March 16, 2006. Id.

Plaintiff now brings suit, for the fourth time, seeking monetary damages in excess of $700,000.00. (Amend. Compl. Section 89).

[1] Plaintiff suit was dismissed without prejudice as to Defendant

II. DISCUSSION

A. Standard of Review

The purpose of a Rule 12(B)(6) motion is to test the sufficiency of a complaint; "importantly, [a Rule 12(B)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). Accordingly, a Rule 12(b)(6) motion should only be granted if "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support

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Secretary of the Army.

of his claim entitling him to relief." *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir. 1999).

Furthermore, when as here, a Rule 12(B)(6) motion is testing the sufficiency of a civil rights complaint, the Court "must be especially solicitous of the wrongs alleged" and "must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Harrison v. United States Postal Serv.,* 840 F.2d 1149, 1152 (4th Cir. 1988 (emphasis added). It is important to note, however, that for purposes of Rule 12(b)(6), the Court is not

required to accept as true the legal conclusions set forth in a plaintiff's complaint. *District 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F 2d 1083, 1085 (4th Cir. 1979).

B. Analysis

1. The Court denies Plaintiff's Title VII and ADEA claims because Plaintiff did not file a timely complaint.

The Court dismisses Plaintiff's Title VII and ADEA claims because Plaintiff could neither meet the statutory period nor avail himself of any tolling provisions.

A. Plaintiff cannot meet the ninety (90) day statutory requisite.

The Court holds that Plaintiff's complain is untimely because it was filed outside the ninety (90) day limitations period. Title VII states, and

The federal regulations promulgate, that aggrieved federal employees, alleging race and/or gender discrimination must file a complaint "within 90 days of receipt of...[Equal Employment Opportunity Commission's] final decision..." (See 42 U.S.C. Section 2000e-16c & 29 C.F.R. Section 1614.407(c)). In regard to ADEA claims, the Fourth Circuit had adopted the limitations period of Title VII. *Rawlett v. Runyon*, 104 F.3d 359 (4th Cir. 1996). Furthermore, when an action is voluntarily dismissed , it is as if it were never filed and no credit is given toward the statutory requirement. *Hewlett v. Russo*, 649 F. Sup[. 457, 460 (E.D Va. 1986).

Here, Plaintif's EEOC decision was dated

August 3, 2003, and his initial judicial complaint was filed on November 3, 2003- exactly ninety (90) days after the EEOC's decision. (Dr. Br. At 2-3). Although within the requisite limitations period, Plaintiff voluntarily dismissed his suit. Therefore, as *Hewlett* instructs, it is as if Plaintiff's suit were never filed. *Hewlett*, 649F. Supp. At 461. Plaintiff receives no credit for the time that elapsed during the pendency of his prior claims. Id.

The Court holds that Plaintiff's subsequent complaints were filed outside the ninety (90) day limitations period; they are therefore, barred from litigation. Accordingly, the Court dismisses, as untimely Plaintiff's Title VII and ADEQ claims.

B. Tolling provisions are inapplicable to Plaintiff's claim

The Court holds that Plaintiff cannot avail himself of any tolling provisions. AS *Hewlett* instructs, "[the] failure of a federal employee to file suit in federal court within the limitations period] of 42 U.S.C. Section 2000e-16(C) is not a jurisdictional bar." *Hewlett*, 649 F. Supp. At 460. When a federal statute of limitations is applicable, the court must look to federal law for any appropriate tolling provisions. Id.

If no applicable tolling provision exists for Title VII claims, Plaintiff's action may be "saved if equitable considerations justify the tolling of the limitations period of 42 U.S.C. Section 200(e)-16(C)." *Hewlett*, 649 F. Supp. at 461. In *Baldwin County Welcome Center v. Brown*, the

Baldwin County Welcome Center v. Brown, the Supreme Court noted tour (4) instances in which the doctrine of equitable tolling may apply in Title VII cases: "(1) where the claimant or plaintiff receives inadequate notice to sue; (2) where a request for appointment of counsel is before the Court; (3) where the Court led the plaintiff to believe he had satisfied all statutory requirements, and (4) where a defendant's affirmative misconduct induced the plaintiff not to act in the appropriate fashion." *Baldwin*, 466 U.S. 147, 151 (1984).

Here, there is no federal statutory tolling provision applicable to Plaintiff's claim. *Hewlett*, 649 F. Supp. at 460 (where plaintiff brought suit alleging Title VII violation). Moreover, Plaintiff

does not assert any of the grounds set forth in Baldwin; thus, the doctrine of equitable tolling is inapplicable. Accordingly, the Court holds that Plaintiff cannot avail himself of any tolling provisions.

2. The Court dismisses Plaintiff's complaint because it fails to give Defendant notice of the claims, and the grounds upon which it rests

The Court dismisses Plaintiff's complaint in its entirety because Plaintiff failed to state a claim for which relief can be granted. Federal Rule of Civil Procedure 8(a) states, " a pleading which sets forth a claim for relief...shall contain....a short and plain statement of the claim showing that the pleader is entitled to relief..." Fed. R. Civ. P. 8(a). Failure of a complaint to state a claim is a fundamental

defect which may be raised by a Federal Rule of Civil Procedure 12(B) (6) motion. A dismissal of a complaint under Rule 12(B)(6) should be granted only where the Plaintiff pleads himself out of court on the face of the complaint.

A complaint in an employment discrimination suit need not contain specific facts establishing a prime facie case of discrimination, but instead, must contain only a short and plain statement of the claim showing that the pleader is entitled to relief. Swierfiewicz v. Sorama N.A, 534 U.S. 506, 512 (2002). "To provide a short and plaint statement of the claim showing that the pleader is entitled to relief... complaint must simply give the defendant fair notice of what the plaintiff's claim

is and the grounds upon which it rests." Id. conclusory allegations that fail to give notice of the basic events and circumstances are in sufficient to state a claim. Id.

Here, Plaintiff failed to file a complaint which presented the facts in sufficient detail to give notice. Plaintiff, in his complaint, alleges race, gender, and age discrimination, harassment, "improper physical conduct," and slander. However, Plaintiff's pleading contain no factual allegations whatsoever to support these claims. For example, Plaintiff contends Defendant discriminated against him on "the basis of race, sex, and age;" however, Plaintiff sets forth no specific incidents of discrimination or disparate treatment. (Amend. Compl. Section

15). Plaintiff contends Defendant made false statements which resulted in a "loss of job opportunities [and] loss of promotion opportunities;" however, Plaintiff provides no details of promotions for which he was entitled but did not receive. (Amend. Compl. Section 10.) Plaintiff contends that he was "embarrassed by direct physical contact" by Defendant; however, Plaintiff does not point to any specific incidents in which he was improperly touched. (amend Compl. Section 15.) Furthermore, Plaintiff contends that he was embarrassed and harassed by defendant; however, Plaintiff does not provide specific incidents or details. [2] (Amend. Compl. Section

21).

The Court holds that Plaintiff's complaint is filled with conclusory allegations; such allegations of discrimination fail to give Defendant notice of the claims and do not state a claim upon which relief can be granted. *Simpson v. Welch, M.D.*, 900 F.2d 33, 35 (4th Cir. 1990). Accordingly, the Court dismisses Plaintiff's complaint, in its entirety, without leave to amend because it would be futile in light of the failure to file suit within the limitations period. *Forman v. Davis*, 370 U.S. 178, 182 (1962).

3. The Court dismisses Plaintiff's Title VII and ADEA claims because he fails to present evidence showing that the exhausted his administrative remedies

conclusory allegations. The list is not exhaustive.

The Court grants Defendant's motion to dismiss because Plaintiff has not come forward with evidence showing that he exhausted his administrative remedies before filing suit. "It is axiomatic that a claimant under Title VII must exhaust his administrative remedies by raising his claim before the EEOC." *Sloop v. Memorial Mission Hosp., Inc.*, 198 F. #d 147, 148 (4th Cir. 1995) ("Where...claims raised under Title VII exceed the scope of the EEOC charge and any charges that would naturally have arisen from an investigation thereof, they are procedurally barred.")) Such a requirement is a jurisdiction prerequisite to adjudication in the federal courts. Id.

Here, Defendant contends that Plaintiff, in his administrative claim, alleged:

> [T]he agency had discriminated against him on the basis of reprisal for prior [EEOC] activity when he was subjected to disparate treatment in terms and conditions of his employment with regard to being denied personnel actions, pay promotions, and training from January 15, 200 to March 8, 2001.

(Df. Br., at 11). Defendant further contends that Plaintiff's Title VII and ADEA claims were not raised in the EEOC administrative claim. And therefore not exhausted during the administrative process. Id. Only those claims stated on the administrative charge may be maintained by a subsequent lawsuit. *Evans v. Technologies Applications & Service Co.*, 80 F. 3d

Here, Plaintiff fails to set forth evidence showing that he exhausted his administrative remedies; thus, the Court grants Defendant's motion to dismiss. Furthermore, it is unnecessary for the Court to througly address the issue of exhaustion of administrative remedies for two reason: (1) Plaintiff's Title VII and ADEA claims are dismissed for untimeliness; and (2) Plaintiff's complaint, in its entirely, is dismissed for failure to state a claim.

III. CONCLUSION

The Court grant's Defendant's motion to dismiss Plaintiff's Title VII and ADEA claims because Plaintiff failed to file his complaint

within the statutory limitations period.

The Court grants Defendant's motion to dismiss Plaintiff's complaint because Plaintiff fails to set forth facts to support a claim upon which relief can be granted.

Furthermore, the Court grants Defendant's motion to dismiss because Plaintiff has not come forward with evidence showing that he exhausted his administrative remedies before filing suit.

For the foregong reasons it is hereby

ORDERED that Plaintiff's Title VII and ADEA claims are dismissed. It is further

ORDERED that Plaintiff's complaint, in its entirety, is dismissed without leave to amend.

The Clerk is directed to forward a copy of this Order to Counsel of Record.

ENTERED this 26th day of April, 2007

_____

Gerald Bruce Lee
United Stated District Judge

Alexandria, VA
4/26/07

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1510

LYNN HOWARD

Plaintiff/Appellant

vs.

UNITED STATES ARMY, C/O Secretary of the Army

Defendant/Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:06-cv-00783-GBL)

Submitted: October 30, 2008. Decided: January 20, 2009

Before KING, GREGORY and AGEE, Circuit Judges.

ffirmed by unpublished per curiam opinion.

Douglas Steinberg, Alexandria, Cirginia; Geroge R. Royer, Toledo, Ohio, for Appellant. Chuck

Rosenberg, United States Attorney, Monika L.Moore, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lynn Howard appeals from the district court's order granting the United States Army's motion to dismiss his Title VII, of the Civil Rights Act of 1964, as amended, and Age Discrimination in Employment Act ("ADEA") claims and dismissing his complaint in its entirety without leave to amend to add state law tort claims and claims under the Equal Pay Act. On appeal, Howard argues that the district court erred in part because it dismissed his action

based on failure to file his Title VII and ADEA claims within the ninety-day statutory deadline. He also alleges that the court erred in dismissing his action without permitting him to amend his complaint to add Equal Pay Act and state law tort claims. Finding no error, we affirm.

We conduct a de nova review of the dismissal of a complaint pursuant to Fed R. Civ. P. 12(b)(1), (6). Etape v. Chertoff, 497 F3d 379, 382 (4th Cir. 2007). We may affirm a district court's judgment on any ground supported by the record. Suter v. United States, 441 F.3d 306, 310 (4th Cir. 2006). After reviewing the record, the parties' briefs, the joint appendix and supplemental joint appendix, we affirm the

district court's judgment for the reasons stated by the district court. See Howard v. US Army, No. 1:06-cv-007B3-GBL (E.D. Va. Apr. 27, 2007).

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Flash Drive: Howard file: Howard v Army condensed Supreme Court Brief